Federal Court of Appeal | Cour d'appel fédérale

Date: 20120215

Docket: A-246-11

Citation: 2012 FCA 51

CORAM: **LÉTOURNEAU J.A.**
NOËL J.A.
PELLETIER J.A.

BETWEEN:

LES SYSTÈMES EQUINOX INC.

Applicant

and

PUBLIC WORKS AND GOVERNMENT SERVICES CANADA and ATTORNEY GENERAL OF CANADA

Respondents

Heard at Ottawa, Ontario, on February 14, 2012.

Judgment delivered at Ottawa, Ontario, on February 15, 2012.

REASONS FOR JUDGMENT BY: THE COURT

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REASONS FOR JUDGMENT BY THE COURT

BY THE COURT

[1] This is an application for judicial review by Les Systèmes Equinox Inc. (the applicant) from a decision of the Canadian International Trade Tribunal (the Tribunal or CITT) wherein the Tribunal recommended pursuant to subsections 30.15(2) and (3) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985, c. 47 (4th Supp.) (the Act) that Public Works and Government Services Canada (PWGSC or the respondent) pay the applicant the amount of $322,377 as

compensation for the lost opportunity resulting from the improper award of a contract to another bidder.

[2] This recommendation was made following a series of decisions from both the Tribunal and this Court. In particular, an earlier Tribunal decision had recommended that the applicant be compensated for its lost opportunity "by an amount equal to one quarter of the profit it would reasonably have earned had it been the successful bidder …" (Tribunal's decision of March 12, 2009, at para. 86). At issue in this application for judicial review is the dollar amount of the compensation recommended by the Tribunal.

[3] The applicant contends that the final recommendation is unreasonable and premised on a number of errors, and asks that the matter be returned to the Tribunal for a new determination of the compensation. The respondent for its part takes issue with the fact that the amount awarded comprises compounded and pre-judgment interest.

[4] Decisions of the Tribunal in the exercise of its remedial discretion to award compensation and determine the amount thereof are to be reviewed on a standard of reasonableness as this exercise goes to the core of its jurisdiction (see *Canada (Attorney General) v. Envoy Relocation Services*, 2007 FCA 176, at paras. 15 to 18, a decision rendered at a time when "patent unreasonableness" was the most deferential standard). The application of the standard of reasonableness extends to the decision to award pre-judgment interest given that this exercise is inextricably intertwined with the Tribunal's mandate to determine the amount of the compensation

(compare *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53; [2011] S.C.J. No. 53, at para. 25).

[5] Applying this standard, we are of the view that no reviewable error has been demonstrated by the applicant or the respondent.

[6] In particular, we do not agree that the method used to assess the compensation was unreasonable. The Tribunal was entitled to consider information derived from actual experience between PWGSC and the successful bidder. In so doing, the Tribunal was careful not to use this co-bidder as a "surrogate" and sought to assess the proper compensation for Equinox' lost opportunity by making the appropriate adjustments (see for example para. 76 of the decision).

[7] The applicant also contends that a different assessment method should have been followed. It argues that the Tribunal should have applied the percentage reflecting Equinox' profit margin to the total expenditures of PWGSC during the contract period. We agree with the respondent that the existence of an alternative method of assessment does not render the decision of the Tribunal unreasonable.

[8] It was also reasonable for the Tribunal to limit the compensation period to five years on the basis that the applicant's claim for compensation beyond this period is speculative in nature.

[9] The applicant challenges the assessment of particular heads of revenues and costs. For instance, it challenges the Tribunal's rejection of the amount provided at Item No. 001-A of Equinox' bid. As noted by the respondent, this item had been found to be non-compliant with the requirements of the procurement process in a prior CITT decision. In our view, it was reasonable for the Tribunal to choose not to consider this item in the assessment of the compensation. Similarly, we do not believe that the Tribunal's assessment of the labour and overhead costs was unreasonable.

[10] The applicant also contends that the Tribunal erred in not compensating Equinox for the lost opportunity to sell its source code. In this respect, we note that no claim for compensation under this head was made by the applicant. It follows that no error can be said to have been committed by the Tribunal on that account.

[11] Finally, the applicant contends that the pre-judgment interest awarded to it should have been greater to reflect the fact that a larger proportion of the expenditures would have occurred earlier on in the performance of its contract. However, the Tribunal did calculate the interest to reflect the applicant's concern that most expenditures would have occurred early in the contract. The applicant may disagree with the amount that was ultimately recommended by the Tribunal, but that does not make it unreasonable.

[12] The respondent for its part argues that the Tribunal did not have the power to award pre-judgment interest, and alternatively, that the interest should not have been compounded. We first note that the respondent did not file an application for judicial review. In *Larsson v. Canada,* [1997]

F.C.J. No. 1044 [*Larsson*], this Court held that a respondent that had not filed an application for judicial review could not seek the judicial review of a portion of the decision (*Larsson*, at paras. 27 and 28):

> **27.** Had the taxpayer wished to dispute the Tax Court Judge's decision on the lump sum payment issue, it was entirely open to him to have brought his own application for judicial review. Under Rule 1620 of the *Federal Court Rules*, a motion could have been brought to have the two applications for judicial review heard together. I agree with the submissions of the Minister Representative that this rule at least implies that there is an obligation on the respondent in an application for judicial review to bring his own application for judicial review where the respondent wishes to review the decision on different grounds than those proposed by the applicant.
>
> **28.** Consequently, I make no comment on the merits of the taxpayer's submissions with respect to the taxation of the lump sum payments. Had the taxpayer wished this to be a subject of judicial review, it was incumbent upon him to bring his own application for judicial review.

[13] We would add that, in any event, it was reasonable for the Tribunal to recommend the payment of compounded pre-judgment interest as part of the compensation owed to Equinox. While the Act does not specifically empower the Tribunal to recommend the award of pre-judgment interest, the Tribunal is entitled to take into account the time value of money. In our view, the Tribunal's remedial discretion as set out in paragraph 30.15(2)(*e*) is sufficiently broad to allow the award that it made.

[14] The application for judicial review is accordingly dismissed. Given the rejection of the application and the respondent's failed attempt to challenge the decision of the Tribunal, the parties should assume their respective costs.

"Gilles Létourneau"
J.A.

"Marc Noël"
J.A.

"J.D Denis Pelletier"
J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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APPEARANCES:

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